IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GC2 INCORPORATED, Plaintiff, vs. INTERNATIONAL GAME TECHNOLOGY PLC, et al., Defendants.	Docket No. 16 C 8794 Chicago, Illinois December 6, 2018 2:30 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS - PRETRIAL CONFERENCE
BEFORE THE HONORABLE MATTHEW F. KENNELLY

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(The following proceedings were had in open court:)

THE CLERK: Case No. 16 C 8794, GC2 Incorporated v. International Game.

THE COURT: All right. So why don't I get everybody's names to start off with.

MR. MEZA: Ricardo Meza, M-e-z-a, on behalf of GC2.

MS. CENAR: Kara Cenar on behalf of GC2.

MS. MEYER: Susan Meyer, M-e-y-e-r, on behalf of GC2.

MR. HORMUTH: Kevin Hormuth on behalf of GC2.

MR. MACEY: Eric Macey, with Novak and Macey, on behalf of defendants.

MR. LIEBMAN: Joshua Liebman on behalf of defendants.

MS. PARKER: And Rebekah Parker on behalf of the defendants.

THE COURT: Okay. I actually -- I want to start with the motion -- I want to go through the motions in limine, not the expert stuff. We will come back to the expert stuff a little bit later, although I reserve the right to kind of do a detour in the middle.

I don't think I am going to be prepared to rule on the expert stuff today because I just -- I need to get a better picture of it, which is what we are going to try to circle back to towards the end of this.

So I'm going to start off with the defendants' motions. I am not necessarily going to ask questions about

all of them, but this is going to kind of largely go in a question-and-answer format, or I may ask you, what's your position on A, B, or C.

So starting with the defendants' first motion in limine, which is the one about limiting the DMCA claims, I apologize for doing this because I ought to have it committed to memory right now, but I need a short memory refresher on what lobby graphics are and what a sprite sheet is and how they are used.

MR. MACEY: Sure.

THE COURT: So are they your sprite sheets or are they your sprite sheets?

MR. MACEY: Our sprite sheets --

THE COURT: Okay. So tell me what --

MR. MACEY: -- and our lobby graphics.

THE COURT: So tell me what they are.

MR. MACEY: Sure.

THE COURT: And how they are used.

MR. MACEY: The lobby is if you download a game and you open --

MS. PARKER: You download the application.

MR. MACEY: Download the application, okay, the DoubleDown Casino application, you would go on the Internet and get it.

THE COURT: Right.

MR. MACEY: Or go on Facebook, actually, or Apple --

MS. PARKER: Apple.

MR. MACEY: -- Apple iTunes or the App Store, right. And you would download it.

When you open it up to play the games, there will be multiple games showing.

THE COURT: Many games. Right.

MS. PARKER: Right.

MR. MACEY: And, in fact, you have to scroll through to see them all.

THE COURT: That's not the lobby, though.

MR. MACEY: That is the lobby page.

THE COURT: That is the lobby.

MR. MACEY: That is the lobby page.

THE COURT: So the lobby graphics would be the little picture that goes with each game.

MR. MACEY: Exactly. And then you need to click on that game to play that game.

THE COURT: Okay. Sprite sheets.

MR. MACEY: A sprite sheet is something that you as a user would never see.

THE COURT: Right.

MR. MACEY: Okay. The sprite sheet has individual images of various games that combine to create the graphics that you ultimately do see when you play the games. It's

internal --

THE COURT: So from a software standpoint, that's where all of the images are that the software is going to grab when various things are happening --

MR. MACEY: Exactly.

THE COURT: -- when playing the game.

MR. MACEY: Essentially, yes. Essentially from one server -- one talks to the other until it does a combine, but only for the mobile application.

THE COURT: All right. Do you all agree with that?

MR. MEZA: Yes, Judge, but just for clarification, so when you download it, the game on the app, you get the lobby images. That's all. When you click on one of the games --

THE COURT: Right.

MR. MEZA: -- Pharaoh's Fortune, that's when you get the sprite sheets.

THE COURT: That's when you get the images from the sprite sheets.

MR. MEZA: Right.

THE COURT: I got it.

MR. MEZA: And the sprite sheets are just a bunch of --

THE COURT: Just a -- it's just whole page of images, basically.

MR. MEZA: Yeah, a number of pages.

MR. MACEY: The user never sees the sprite sheet.

THE COURT: You don't see it. I got it. Okay. All right. Fine.

Okay, then. What I think -- it seems to me that in reading the discussions of -- on the first motion in limine, that it would be helpful to me, although it's in here, I think, to get -- to get a handle -- make sure I have a good handle on what the plaintiff's theory of the, quote, unquote, distribution is, okay? And I actually want to start with kind of a hypothetical.

Let's say that I, Kennelly, take, let's say, Bob Woodward's copyrighted article from the Washington Post and I post it on Kennelly's blog, and Bob Woodward's article has a little C, circle, Washington Post at the bottom of it, I take that off, and I put C, Matthew Kennelly, and I put it on my blog, okay? And I have a thousand people then download it from my blog.

Is that one DMCA violation or a thousand or something in between or none of the above?

MR. MEZA: It's one act.

THE COURT: It's one. Okay. So when you're telling -- when you're giving me your theory of distribution, I want you to tell me how what we're talking about here differs from that. Because I thought that was going to be your answer, and it seems like to me it's the right answer.

MR. MEZA: Right.

THE COURT: So you need to explain to me how what you're talking about here is different from what I just said.

MR. MEZA: The difference is after an individual downloads the app and he's got the lobby photos, that person presses the image for Coyote Moon, and at that point, that image then gets sent, copied, onto that device.

THE COURT: I'm playing this on my phone, that image, the software, the app, essentially, goes out and grabs the image from a server somewhere and puts it on my phone.

MS. CENAR: The game packet with the sprite sheets are on your phone, so there's --

THE COURT: The whole thing is on my phone.

MS. CENAR: The game packet, which includes multiple sprite sheets for just that game, is on your phone.

THE COURT: And my phone, when I download the app, or when I click on the game, let's say, where does the software -- where does my phone go to get all this stuff?

MS. CENAR: It goes to the media server and the media --

THE COURT: Whose media server is it?

MS. CENAR: It's IGT's and DoubleDown's media server, on the AWS server.

THE COURT: You're done.

MS. CENAR: It's IGT and DoubleDown use Amazon Web

Services as the server where they are located.

THE COURT: We have now introduced another term that I was -- so what is Amazon Web Services?

Again, I apologize for being a Luddite and not knowing this.

MS. CENAR: Sure.

Amazon Web Services is a service that you subscribe to, and you essentially rent space on a server that assists --

THE COURT: They've got like some massive server farm out in California --

MS. CENAR: Distribution -- a whole distribution channel that you --

THE COURT: So I'm renting space from Amazon, but it's the space that I'm renting. I'm like a tenant of Amazon.

MS. CENAR: You control the account.

THE COURT: Okay.

MS. CENAR: And so you can put whatever stuff on it, you can make whatever changes, and then you hit a button, and it --

THE COURT: Okay. So I'm -- I've now -- I've now clicked on Coyote Moon on my phone, and my phone does what? It goes to that server that's housed at Amazon Web Services, and it brings all the images back to me.

MS. CENAR: Brings a game packet that has a set of sprite sheets, it has computer software code, and it goes to

the cache on your phone.

THE COURT: Okay. So am I correct that the plaintiff's position is that each time somebody does that, that's one distribution, one DMCA, maybe more than one, but it's one -- if you download it and you download it and you download it and you download it, we've got at least 40 MCA violations.

MR. HORMUTH: It's one act of the defendant.

THE COURT: Explain to me why that's different from my Washington Post example.

MR. HORMUTH: The primary distinction between your hypothetical and the technology that's at issue is the focus on the defendants' conduct versus the user conduct going to grab that blog post. You would be passive in that after you've put one --

THE COURT: So why isn't it the same in the sense that the defendant, and let's just say DDI for purposes of discussion, that DDI has put its conduct on that Amazon Web Services server one time and when you downloaded it and you downloaded it and you downloaded it and you downloaded it, that's just like all of those readers downloading my Bob Woodward article?

I don't care who --

MR. HORMUTH: I don't want to talk over each other --

MS. CENAR: Go ahead.

MR. HORMUTH: -- but I think we've got a -- and it's hard to visualize. I'll try to narrate it the best I can.

Did you get a chance to review it?

THE COURT: I looked at that --

MR. HORMUTH: That's just helpful from a -- me understanding what you've seen.

So what you saw on that demonstrative is the distribution from the media server to the device, and it's the media server that speaks to DoubleDown software that's been placed on that device.

THE COURT: Okay.

MR. HORMUTH: When -- there's a separate issue --

THE COURT: Wait a second. Say that again. The media server, which is the AWS -- Amazon Web Services server -- no?

MR. HORMUTH: It is. It's --

MS. CENAR: It's defendants' account on that.

MR. HORMUTH: But it's controlled -- right.

THE COURT: Okay. Fair enough.

MR. HORMUTH: Yes.

THE COURT: It speaks to what again?

MR. HORMUTH: It speaks to the DoubleDown software that is placed on the phone.

THE COURT: Right. I get that.

MR. HORMUTH: Back and forth.

What I think you're thinking of, and I'm -- it's somewhat complicated, so I want to make sure we are on the same page.

THE COURT: Okay.

MR. HORMUTH: There is a one-time issue in this case which is IGT's conduct in placing and making available that altered and false CMI onto the media server, but that's just step one.

THE COURT: And what would you call that one-time violation? That's a distribution violation, or it's a removal of CMI, or what is it exactly?

MR. HORMUTH: There are two things that occur there. It's providing the false CMI up to the media server, and --

THE COURT: So that's not the distribution violation.

MR. HORMUTH: Correct.

THE COURT: The thing that you're saying happens more than once is the distribution violation.

MR. HORMUTH: That's the speaking from the media server to the DoubleDown software that is placed on the phone.

THE COURT: Okay. And so why -- if IGT only did something once -- in other words, they put their stuff on the media server -- why is it a separate violation every time somebody downloads the game from the media server?

I'm going to actually -- if you want to use that thing, I can actually put it up on the screen.

MR. HORMUTH: That'd be --

MS. CENAR: Judge...

THE COURT: Go ahead.

MS. CENAR: There's two things -- there's two different distributions that we're talking about. The first one is from the media server to the device and its sprite sheets, and then there is a distribution off the sprite sheets because it's a different image. It's a copy of the image off the sprite sheet.

So with respect to the first image, the difference -- there's two differences from your article posted on your blog. What's being downloaded is not the whole media server every game for everything reflected in the lobby graphics. It's a single game, it's a number of sprite sheets, and it only occurs when the IGT software on the device speaks to the media server.

THE COURT: And why does that make a difference?

MS. CENAR: Well, it makes a difference because they're all defendants' acts, and it's --

THE COURT: I mean, there is not anybody out there, there is not a little man in there, saying, okay, send this thing to Cenar at this point, right? It's software that's doing all of this?

MS. MEYER: Yes, your Honor, it's IGT's software that they designed and had options of putting an entire game on

your computer --

THE COURT: So you need to explain this to me because I -- and I am probably more tech savvy than the average federal district judge, but that's a fairly low threshold, okay?

I have to think that when I -- that when I have this Kennelly blog, it's probably not a server sitting in my house, okay? It's probably -- I'm probably renting space on a server somewhere, some blog-hosting website or some blog-hosting service, and that every time somebody downloads that article, their computers, their phone, is sending the signal to that server, and the server is sending the article to their phone.

MS. MEYER: And they're getting the same article. You're absolutely correct. The article that they're downloading is Bob Woodward's article. That is that same article.

THE COURT: So you're saying it's different because they are not getting the same thing?

MS. MEYER: That's correct.

THE COURT: How are they not getting the same thing?

MS. MEYER: What they're getting is a packet of sprite sheets, and what the technology is doing is sending it to go put together different -- if we download this at the same time, Kara and I can be sitting in the same place, push the same button, we are not going to get the same experience.

It's going to be a different role, it's going to be different images, it's going to be a different order of things.

THE COURT: I thought you said that the game is basically running off of your phone, not off of the server.

MS. MEYER: No, sir.

MS. CENAR: Well --

MS. MEYER: I will let you finish the story.

MS. CENAR: -- let me -- okay.

The game packet with the sprite sheets goes from the media server to the cache in the device. IGT's and DoubleDown's software then says, go to this location on the sprite sheet and pull this image off, put it on the screen, go to this portion, pull IGT's logo off, put it on the screen, go to this portion in the code, pull the copyright management information, put it across the bottom, and that's different than just downloading the article.

Downloading the article is the sprite sheets are what shows up on the screen, and that's not what occurs here. The sprite sheets go to the cache, copies are made off the sprite sheet and put up on the screen. So they have essentially distributed a distribution system to your phone.

THE COURT: And if the focus is -- and I understand that there may be some dispute about this, I made a ruling -- if the focus is on what the defendant did, what you're telling me, I guess, is that every time somebody downloads the game,

it's not the somebody that's doing something, it's the defendant that's doing something.

MS. CENAR: Yes.

MR. MACEY: That's correct.

THE COURT: And the reason you're saying the defendant is doing something is because -- hang on. I'm going to -- no, don't try it. I'm groping for it. I want to be able to articulate it myself.

The reason you're saying the defendant is doing something is that it's not just downloading a thing, it's downloading a whole collection of stuff plus the mechanism by which it's going to be transmitted to you.

MS. CENAR: Correct. So it's not your article coming off the blog, it's essentially every letter in the alphabet or every word that you put in put in a jumbled thing, and then it gets compiled on the end user's part.

THE COURT: Okay. And before I flip over to defense counsel and have them give their take on this, in all of the cases that you guys have cited on DMCA violations, are there any of them like what we are talking about here, and if so, which ones?

MS. CENAR: The answer is no. This is an issue of first impression with respect to an interactive thing --

THE COURT: Yeah.

MS. CENAR: -- and an app download.

So the other ones relate to putting one-time McClatchey, putting it up once, and it getting distributed to whoever subscribed to it. It is sending an email. So if I send one email to you, that's one distribution, but if I send one email to everybody else here --

THE COURT: That's more than one.

MS. CENAR: -- that's -- no. That would still be one distribution, even though there are several --

THE COURT: Because they copied everybody on the same one.

MS. CENAR: But my email to you and my email to them would be two separate distributions.

THE COURT: In other words, if I send one email but I send it to eight people, it's one. If I send the same email eight separate times, it's eight. That's what the cases are about. It's not about like anything like this.

MS. CENAR: No. This --

MR. HORMUTH: Not this technology, but there are cases that are more analogous in terms of what is a separate distribution than McClatchey.

THE COURT: Like what? Which one other than McClatchey? Because McClatchey is just -- you're basically saying -- I'm looking for the case that I'm going to go read that's going to tell me that what you just said would -- everything you just said is right.

MR. HORMUTH: Okay.

THE COURT: And if there is none, just tell me there is none, and I won't go looking for it.

MR. HORMUTH: Well, it's not this technology, but if you look at the Goldman case that we cited, in the Goldman case, the court didn't limit the number of DMCA violations because there was evidence that the defendant in that case sent infringing computer programs to multiple hospitals at different times.

THE COURT: Okay. That's a different kind of strategy.

MR. HORMUTH: Right.

And the court in Goldman talked about McClatchey, and Goldman --

THE COURT: Right.

MR. HORMUTH: -- distinguished McClatchey and said McClatchey found that the act of simultaneous distribution, and that's what we don't have in this case, we don't have an act of simultaneous distribution --

THE COURT: But we didn't in my Bob Woodward example either, depending on what you call distribution.

MR. HORMUTH: Right.

But there wasn't a simultaneous distribution of copyrighted -- of a copyrighted picture to 11- -- 1,147 subscribers where the copyright information had been removed.

And then it went on to distinguish McClatchey to say that unlike a television signal or an AP Wire story or perhaps the blog example where it's sent simultaneously to -- or is just out there one time --

THE COURT: All right. Thanks.

Mr. Macey, your turn.

MR. MACEY: Sure. And my colleague --

THE COURT: Whoever wants to talk, that's fine.

MR. MACEY: I've got it. First, the Amazon web server is not simply a storage house. It is a dynamic processor that creates connectivity that is required for you to play the game.

So in other words --

THE COURT: See now --

MR. MACEY: -- if you didn't have --

THE COURT: -- to the uninitiated listener like me, it just sounded like you were a guy on the show The Office.

Say that in plainer English.

MR. MACEY: Sure.

THE COURT: I know you were trying.

MR. MACEY: Sure. It's not a box, it's not a digital box where DDI, DoubleDown, just sends information and the information just sits there.

THE COURT: Okay.

MR. MACEY: It's active.

THE COURT: Okay.

MR. MACEY: It has to do things to be able to get the material on there to the end user to play the game.

THE COURT: Fair enough. I get it.

MR. MACEY: So there is an intermediate entity there, all right? Even their expert attests to that.

Okay. All right. That's number one.

Number two, to use your example with Bob Woodward and the questions that you asked each one of them, the user must download. The user must push the button to get the game. The user must push the button to get the reels to spin. No matter what happens, the user must act. And the case law from McClatchey, which you relied on in your summary judgment and its progeny, all say the following: When it is the user's conduct at issue, you don't look at it. It is the conduct of DDI that's at issue here.

DDI does one thing. DDI sends material, in whatever form you want to call it, software or otherwise, to Amazon Web Services, and that's its act.

Now, how many times it does that, what it does it for, whether that constitutes a violation of the DMCA, causes intent, those are questions not today. But that is the act that they engage in, is to send that to AWS. From that, they do nothing. They sit back and --

THE COURT: Well, they might update the software --

MR. MACEY: That's a different question. That may or may not be another violation. I understand that. But they do nothing else, okay? From there on, nothing can happen. Nothing can happen.

THE COURT: So in other words, if the only version of the software is version 1.0 and the only server it's sitting on is Amazon Web Services -- the only service it's sitting on is Amazon Web Services, there's one -- your position is there's one act of distribution, and whether that game gets downloaded one time -- whether that game gets downloaded one time or a hundred times or a million times, it's not a hundred or a million acts of distribution because you, the defendant, DDI, did one thing.

MR. MACEY: That's correct. And it's the only reason -- the only way it gets downloaded is for you to do it.

THE COURT: Is for me to do so.

MR. MACEY: Is for the user's activity.

Now, you asked --

THE COURT: If I were to look at -- what's the case?

MR. MACEY: Two.

THE COURT: Two. Okay.

MR. MACEY: No, really one. I'm sorry.

THE COURT: Okay.

MR. MACEY: Ms. Parker will distinguish Goldman first, and I will let her do that.

MS. PARKER: The Goldman case they relied on, I think your Honor already realized that's a different case. It had to do with what's actually sending, a physical program to different recipients at different times. So that's obviously distinguishable from what we're talking about, which is the singular act of uploading it. So that case is different.

The case that we think is the most analogous is one that we relied upon in our summary judgment motion and reply. That's the Reilly v. Plot Commerce case.

THE COURT: Just -- because I know what I got in front of me. Is it cited anywhere in the motion in limine stuff?

MS. PARKER: I don't believe so. Let me look.

THE COURT: Okay. Reilly. What's the cite for it?

MR. MACEY: R-e-i-l-l-y, v. Plot Commerce.

THE COURT: What was the second name? The defendants' name was what?

MR. MACEY: P-l-o-t, Commerce, C-o-m-m-e-r-c-e.

THE COURT: What's the cite?

MR. MACEY: 2016 WL 6837895 (S.D.N.Y.).

THE COURT: 6837895.

MR. MACEY: Right.

THE COURT: And what's that case about?

MS. PARKER: Well, in that case, the defendant allegedly copied plaintiff's photograph, altered it, and

uploaded it to its website. And the plaintiff sought -- the defendant did that. The plaintiff sought five statutory awards for that upload because her image appeared on five different web -- different pages within that website. So not just once, but it appeared five different ways five different times. And the court held that that constituted one violation.

And the language that the court -- and the court first looked at the technology, and we think that the language it used is a posit here. The court said: Many web pages are dynamic, meaning they can interact with databases before assembling and displaying the final web page on a screen. An image or other content need only be uploaded once to a database before it can be used to create multiple dynamic web pages based on the choices made by the user of the site.

And in that case, plaintiff failed to present evidence that defendant uploaded the photograph more than once, so the court limited it to one distribution violation.

MR. MACEY: We cited that in our summary judgment motion.

MS. PARKER: Right. And reply as well.

MR. MACEY: And we view that as exactly what's going on here. They're claiming that these sprite sheets are combining to make different pages are no different than what the court talked about in Reilly. It's exactly it. It's the

user that drives the technology once it's been uploaded. DDI does nothing else whatsoever.

So unless you have any questions, I can go into this --

THE COURT: No, you have given me what I need to know.

Do you want to say something about Reilly?

MS. CENAR: Yes, your Honor. I think the -- Reilly actually supports what we're saying, and this isn't the photo. They're submitting a game packet --

THE COURT: By the way, I'm sorry, without being overly pedestrian, and not that it actually matters, but -- although it might, I just pulled up Reilly. It's a report and recommendation by a magistrate judge, and at the end it has this kind of standard lingo about how you have X amount of time to object.

Do we know whether this ended up becoming the ruling of the court?

MR. MACEY: I believe it did.

THE COURT: Okay. I mean, there is a way to find out, I suppose.

All right. Anyway, go ahead, Ms. Cenar.

MS. CENAR: This isn't a photo that's put into a website and the software of the website puts it in different locations. This is a set of sprite sheets that has a set of

GC2's images on them that gets sent. And I disagree with what defendants are saying, that DDI does nothing after putting it on the server, because it's DDI's software once those sprite sheets get distributed to the end user device that causes copies to be made off the sprite sheet and additional acts of altering, modifying, and providing CMI.

THE COURT: Okay. My last question on this for both sides is does my determination by what we have just been talking about, whether it's the scenario we are talking about is one act of distribution for purposes of DMCA or more than one, does my decision about that essentially determine motion in limine No. 1, or is there other stuff that I also have to decide?

MS. PARKER: I think that determines the most important aspect of motion in limine No. 1. We had two parts to it. The first part was that the end user and as well as the terms of the use -- I guess that's something we haven't discussed yet -- but that stuff was already decided by you on summary judgment and could not give rise to violations.

And then in the second part of our motion in limine 1, we ask that you limit them to a maximum of six violations, much like the court in McClatchey limited the plaintiff there to two violations on a motion in limine.

So your -- what your ruling would absolutely deal with the first part, which is, frankly, the biggest because

under their end user theory, they're seeking, you know, billions to trillions of dollars in damages --

THE COURT: So if I go back to plaintiff's theory for a second, so if -- and this doesn't -- I ask this not because it's determinative of my decision, because, hey, if the law says that somebody is liable for a billion dollars, then so it goes, you know, but -- pick a game. Coyote Moon.

MS. CENAR: Yes.

THE COURT: If your theory is correct, then, essentially, what the expert or the summary witness, whoever is going to say -- present to the jury is, okay, the judge is going to tell you that this is what constitutes an act of distribution, and I've looked at all the records, and here's how many there were, what's the number?

MR. MACEY: No, I don't think -- well, go ahead. You can -- I don't believe their expert attests to that. They use something called -- a document that we produced called --

THE COURT: Okay. Fair enough. It comes from the document.

MS. CENAR: It comes from the --

THE COURT: Somebody is going to stand up in closing argument and is going to say, Exhibit 47 proves that -- what's the number?

MR. HORMUTH: We have the daily average user numbers and the monthly average user numbers from the defendant that

supply the number.

THE COURT: Okay. And what is it?

MS. CENAR: It's different for each game.

THE COURT: Just pull one --

MR. MACEY: 5.8 billion to $55.8 billion.

MS. CENAR: Well, it depends on what you use --

THE COURT: I don't want to talk about dollars. I want to talk about users. The number of times it's been downloaded.

So in other words, if you --

MS. CENAR: Well, I can --

THE COURT: -- take the average daily and multiply it by 365 times the number of years, what are we talking about?

I know you know this. I know you know this figure.

MS. CENAR: For Coyote Moon on the first month --

THE COURT: Yeah.

MS. CENAR: -- there were 1,000,856 distributions.

THE COURT: Okay. Remind me what the -- so the DMCA says X per -- it's up to X per violation.

MR. MACEY: 2500 to 25,000, unless you determine on a remitter --

THE COURT: That it's not willful.

MR. MACEY: -- that it's -- that it's innocent or something like that.

THE COURT: Innocent, right. Okay.

MS. CENAR: And it's per violation.

THE COURT: It's like other statutory copyright --

MR. MACEY: Per violative act.

THE COURT: All right. And the determination -- and I know I'm skipping ahead to different stuff, but the determination of whether the usage was innocent or not willful or whatever the trigger is to drop it down, is that a finding that I make or is that a finding the jury makes?

MR. MACEY: You make.

MS. CENAR: That, I believe, is a court decision.

MR. MACEY: Under the statute.

THE COURT: I mean, assuming I could submit an advisory question to the jury or something like that. Okay.

All right. So, look, my -- I am not going to give you an answer to this right now because I don't know what the answer is. I don't know what my answer is. I am going to have to reread all this stuff and give it some thought.

I mean, I know this is a big deal. This is maybe the biggest deal. That's probably why it's motion in limine No. 1 as opposed to No. 17. And so I am going to write something about it, it's probably not going to be terribly long, but we're just going to set that aside and go on to other stuff.

MS. PARKER: Your Honor, do you mind if I state for one moment?

THE COURT: I don't. That's fine.

MS. PARKER: I just want to ask, when we wrote our motion in limine, it was our understanding that you had already ruled on these issues. So I just wanted to refer you, when you're reviewing materials to prepare your opinion, ask that you also look back at --

THE COURT: Go look at my -- no, I'm --

MS. PARKER: -- at our summary judgment.

THE COURT: No, no, that, I am not going to do. The summary judgment filing, I am not -- you are not going to incorporate by reference everything that was filed in summary judgment.

MS. PARKER: No, it's just -- okay. Then the only argument we made there I suppose we haven't talked about today was just that courts -- the argument based on several cases, including the one we just discussed, have ruled that you must interpret the DMCA so as not to lead to an absurd result and in that damages --

THE COURT: Okay.

MS. PARKER: -- were absurd when you counted -- you know, based on the number of downloads.

MR. MACEY: Remember the copyright file sharing where people were file sharing for free?

THE COURT: Oh, yeah.

MR. MACEY: One of them was the LimeWire case, and it ended up to be --

THE COURT: The?

MR. MACEY: It's called LimeWire. We cite it in our summary judgment. That's why she's referencing it.

And as a result of the LimeWire case, the court says, I'm not going to give, you know, billions of dollars or hundreds of millions of dollars. It's more than the music industry made. It's just not what the statute was for.

THE COURT: Yeah, but --

MS. PARKER: The Reilly court isn't --

THE COURT: -- you know, there is -- it would seem to me that there is -- and I really don't want to get off on discussing this, but just as a comeback, rather, it seems to me that, arguably, the question there is that -- I am not supposed to rewrite statutes, okay? That's what some people call judicial activism. It's supposed to be bad, right? I'm not supposed to rewrite statutes. If Congress wrote a stupid statute, then Congress wrote a stupid statute, and somebody can go write their Congressional representative and try to get it changed.

I am not supposed to say, well, because this statute is stupid, I am not going to interpret it to mean what it says. Perhaps when you get to the next step -- in other words, if somebody is found liable because a statute was written in a bad way and they're given some ridiculous amount of damages -- perhaps there's then a due process issue about

that. I think that's probably the way these days the Supreme Court looks at stuff. But I don't know. I could be wrong.

Anyway, we are done talking about that. We are going to talk about other stuff.

MS. CENAR: Your Honor, if you want Eric Blake to come in and explain the technology and the tutorial, who is our forensic expert, we are happy --

THE COURT: I've gotten a good enough explanation for now. I don't need that at this point.

MS. CENAR: Thank you.

THE COURT: Okay. So let me just get kind of reorganized here.

Okay. So I've ruled on defendants' motion No. 2. It seems to me that motion No. 3 relates back to motion No. 1 because that's the evidence of the number of end users, so I'll rule on that when I rule on defense motion No. 1.

MR. MACEY: Right. The only difference -- I'm trying to think -- in 3, the end users is that the demonstrative doesn't reflect the action of the user that struck the game in the first place.

THE COURT: Actually, I -- fair enough. I do have one question about No. 3 that I wanted to ask to the defense .

So in the plaintiff's response on No. 3, the plaintiff says -- they talk about the stuff we have just been talking about, but they also say -- let me just find it

here -- that it's also relevant to the contributory infringement claim that they make, which I understand to be a separate argument.

MS. CENAR: Yes.

THE COURT: So explain that one to me --

MS. CENAR: So one of the elements on contributory infringement is we have to show --

THE COURT: Somebody else infringed.

MS. CENAR: -- a direct infringer, and the end users copying onto the cache would be the direct infringement.

THE COURT: But in order to show that somebody else infringed, you don't have to show that a million people a month infringed.

MS. CENAR: Well, it would be every time it's downloaded because it goes to the public --

THE COURT: No, I understand, but if it's an element of the claim -- if it's an element of the claim to contributory infringement that there was an act of infringement. It's not an element of the claim that there were 12 million acts of infringement. You wouldn't have to -- why would you have to put in the specific number of end users in order to prove the contributory infringement?

MS. CENAR: Only as it relates to the public performance violation, that it's --

THE COURT: What's that?

MS. CENAR: -- it's the same people at the same time or different times, different locations. So --

THE COURT: When you say "public performance violation," what do you mean exactly?

MS. CENAR: That the -- that the defendants contribute to a public performance violation of --

THE COURT: Is what you're saying that because so many are using it, it was, in effect, a public performance?

MS. CENAR: Yes, that it's different people at different locations -- Susan and I sitting in different restaurants at the same time or at different times together or apart. So that was part of what Laykin provided.

THE COURT: And where does public performance come into play? Where does it fit into the whole scheme of the claims?

MS. CENAR: It's an act of copyright infringement, and it's an act of contributory infringement.

MR. MACEY: We have a separate motion --

THE COURT: Is there some sort of a threshold number of people who have to be doing something for it to be a public performance?

MS. CENAR: Not that I've seen under the law, your Honor.

THE COURT: So in other words, when Netflix distributes movies, and let's say a million people watch Roma,

that's a public performance even though they're all watching it separately.

MS. CENAR: Yes. Under the statutory definition of public performance under 101, the answer would be yes. 17 U.S.C. 101.

THE COURT: What's the definition under 101?

MS. CENAR: To perform or display a work publicly means to transmit or otherwise communicate a performance or display of the work to -- you know, to the public --

THE COURT: You don't need to finish that.

Okay. But so what that is, that's a type of act of infringement.

MS. CENAR: Correct.

THE COURT: Copying is one. Public performance is one.

MS. CENAR: Display, distribution, yes. It's one of the six.

THE COURT: It wouldn't seem to me, though -- well, I mean, there is a 403 issue that comes in there -- some Rule 403 issue that comes in there somewhere.

MR. MACEY: And in addition -- I'll wait.

THE COURT: No, go ahead.

MR. MACEY: There's no damage -- there's no actual damages. There's no profits from these end users. And if you look at their pretrial order, there's no damages from this at

all. So what's it for, other than to prejudice the jury that there's millions of people who use this thing all the time?

THE COURT: Okay. We have talked enough about No. 3. No, seriously, I have to impose some element of control here.

So I've already ruled on 4, I've already ruled on 5, and now we are to 6, which I think is -- maybe we just kind of segued into.

No. 6 is entitled Exclude Evidence and Argument Concerning Infringement By End Users, Casinos, or Platforms. And the motion basically says the plaintiff hasn't itemized any actual damages from that, which is the point that Mr. Macey just made, I think.

And the summary judgment ruling that I made precluded the plaintiff from recovering the profits of third parties, like the online casinos.

And the plaintiff says, well, we have to show -- this is the same argument that we were just talking about -- we have to show direct infringement by somebody else to prove contributory. It's the same thing we just talked about.

MS. CENAR: I want one caveat. You're tying everything or they're tying everything to an award of damages. Plaintiff has also asked for injunctive relief and impoundment.

THE COURT: Right, but that -- I decide that. So, I mean, if I were to conclude that something is relevant on

injunctive relief but not properly admissible in front of the jury, for whatever reason, I can say, well, you can put that in after the jury's gone.

So I don't need to hear more about 6. It's the same issue we were just talking about. Let me just make a note about the injunctive relief.

MS. CENAR: One other, your Honor?

THE COURT: Nope. Sorry.

Okay. No. 7, terms of use.

Okay. So this one I have to honestly say I'm not quite sure I understand what your -- what both sides are fighting about.

So the motion says that in the motion to dismiss, I concluded that the terms of use link isn't conveyed in connection with the work, and I dismissed the consumer -- later -- or I also dismissed the Consumer Fraud Act claim. I think that was in summary judgment.

Therefore, the defendant argues the terms of use aren't relevant, I shouldn't allow anything in about them. The plaintiff says the terms of use are copyright management information, or CMI, that's relevant to the DMCA violations, and it contains false representations about who own the artwork. And so I should let it in for that reason.

The reason I got lost on this is I had no sense from the motion or the response exactly what we are talking about

in terms of evidence at a trial.

So what is the -- what do you think the plaintiff is going to put in that you want to keep out?

MS. PARKER: That they're going to put in evidence of a terms of use link at the bottom of the -- that was -- so it's -- we argued this on summary judgment. Their theory has changed now. They are looking at the packet of sprite sheets of the lobby images that we talked about earlier that has an image of every game. When it was -- when AWS, the Amazon web server, sent that packet over, it sent it with some code that included in it terms of use, a link to the DoubleDown terms of use, and like a copyright notice.

We think that would be barred by the same -- for the same reason as your motion to dismiss ruled, that because there's so many images there, it's not properly considered conveyed in connection with the two games at issue out of -- I counted the sprite sheet they attached as Exhibit H had 88 different images on it.

So they're talking about 2 out of 88 images conveyed that our -- that this could relate to, and you previously had ruled that with respect to the lobby, which is what these images relate to, that was not conveyed in connection with.

So based on that, we think that they should not be allowed to argue DMCA violations based on the terms of use.

MR. HORMUTH: Your Honor --

THE COURT: Hang on a second.

Go ahead.

MR. HORMUTH: There are two issues with terms of use that are separate and apart from your ruling on the lobby graphics in the summary judgment.

Terms of use are also conveyed in connection with the actual game play where the images displayed -- and that's different than the lobby graphics, where it's just every icon for every game that's in the lobby. This is -- these are the terms of use that are conveyed in connection with the images, GC2's images, during the actual game play.

There's another term --

THE COURT: How are they conveyed?

MR. HORMUTH: They are conveyed because when you're playing the game, there is a menu to the terms of use --

THE COURT: Okay.

MR. HORMUTH: -- and you go to the terms of use, and there --

THE COURT: Okay. And it links to --

MR. HORMUTH: -- there's CMI in that --

THE COURT: It links the DDIs not to anything having to do with GC2. Is that the problem?

MS. CENAR: Well, the terms of -- everybody talks about the link of the terms of use, but the actual terms of use document is evidence of a number of things. It's a

license that the defendant --

THE COURT: Okay. I'm at a way simpler level than you are talking about here.

So is this terms of use issue, is it -- it pertains to the DMCA claims, not the copyright infringement claims?

He is nodding yes, you are nodding no. Get on the same page.

MS. CENAR: It pertains to both.

THE COURT: It pertains to both.

MS. CENAR: It pertains to both.

THE COURT: Both.

MR. HORMUTH: Right. But as it pertains to the DMCA, unlike the lobby graphics, where it's just the icons --

THE COURT: One question at a time.

Is it both or is it just one?

MS. CENAR: It pertains --

THE COURT: In other words, how is it relevant to the copyright infringement?

MS. CENAR: It's relevant to the copyright claim because they are licensing unlicensed works to an end user through the terms of use, and they're making representations in the terms and conditions of use that they own the content that is on there.

THE COURT: But making a false representation about who owns a copyright isn't a copyright infringement.

MS. CENAR: But it's --

THE COURT: Copying is a copyright infringement.

MS. CENAR: Right. But it facilitates the infringement, and that's one of the elements in the DMCA, is to --

THE COURT: That's why I am trying to figure out whether this -- this sounds like this is all related to the DMCA claim, not to the copyright -- I mean, there's --

MS. CENAR: Well, your Honor --

THE COURT: -- a pattern jury instruction on copyright infringement. It's not -- and it doesn't say what you're talking about.

Here's what it says. Here's what it says the plaintiff has to prove to prove copyright infringement. It's Pattern Jury Instruction 12.2.1.

Plaintiff has to prove three things: The work is a subject of a valid copyright, plaintiff owns the copyright, defendant copied protected expression.

Then there's a definition of each one of those terms, and the relevant one here would be the definition of copying, and it doesn't say saying something false about it. That's the DMCA.

MS. CENAR: Right. But the Pattern Jury Instructions also say, amend if you're going to address a violation of the distribution right and the license terms deal with violation

of the distribution right. The terms and conditions of use are a license agreement that facilitate the distribution of GC2's copyrighted works --

THE COURT: Tell me where are you talking about in the Pattern Jury Instruction.

MS. CENAR: It's a footnote that's --

THE COURT: It's a comment, but which comment to which instruction? Which instruction?

MS. CENAR: Note 4: Copied. If the infringement consists --

THE COURT: What is the number of the instruction?

MS. CENAR: Oh, I'm sorry. 12.1- -- 12.2.1, note 4.

THE COURT: If the infringement consists of something other than copying, i.e., publicly performing, publicly displaying, distributing copies of, the instruction should be modified accordingly.

Honestly, then it would just -- then we'd just substitute the word "publicly performing" or "distributing" in for the word "copying" in element 3.

It's not a copyright infringement to say that it's mine when it's yours. That's -- it might be something else.

MS. CENAR: But it's evidence of their involvement in acts of distributing it.

THE COURT: I mean, it's not necessary. I mean, it's pretty small evidence of that.

Okay. So let's just focus on the DMCA for a second.

So if we're talking about the terms of use, what's the nature of the DMCA violation that that pertains to? Is it transmitting -- I'm probably using the wrong lingo. Is it transmitting false DMCA, or is it removing DMCA, is it both, either, something else?

MR. HORMUTH: It's the terms of use are conveying --

THE COURT: I didn't -- I botched that. Let me restate it.

Is it transmitting false CMI, distributing false CMI, neither of the above, or a combination thereof?

MR. HORMUTH: It's attributing false CMI to the images that are displayed during game play.

THE COURT: Okay. So in other words, what you're saying, when it pertains to the DMCA violation on the terms of use, is that when the defendant links their terms of use to your images on the sprite sheet, they're transmitting essentially false copyright management information about those images. And some other stuff too, but that's certainly one of the things they're doing.

MR. HORMUTH: Correct.

THE COURT: Okay. Stop.

Then why isn't the terms of use relevant?

MR. MACEY: I'll let Rebekah speak.

THE COURT: I don't care.

MR. MACEY: First it has to be conveyed in connection with the CMI. So if you look at this, they say, well, it's not there. You have to press on the menu, you have to go to another screen --

THE COURT: So what Ms. Parker was saying a minute ago is that's the -- what you just said is the ruling that I made on the motion to dismiss, that that wasn't enough of a connection. That wasn't with, in other words.

Right?

MS. PARKER: You ruled it wasn't conveyed in connection with, and -- right. And then they cite to this Exhibit H in their response as an example of the terms of -- of what the terms of use -- which sprite sheets they were conveyed in connection with, and that is just, you know, a picture of 84 different images.

THE COURT: Okay. I understand both sides' positions. We are moving on.

Guys, you filed 22 motions in limine and five Daubert motions. We are moving on.

Okay. No. 8, prior copyright or contract breaches by the defendant. The defendant says, basically, this is improper other act evidence. That's a summary. But the plaintiff says -- and I want to hear what the defendants' response is to this. The plaintiff's response says, This is relevant to show the background of the contract's Seventh

Amendment and the defendants' knowledge of the plaintiff's mark, copyright, whatever.

So respond to that.

MR. LIEBMAN: Your Honor, they don't need to put in evidence of the actual bad acts or the allegations of bad acts to get in evidence of the party's relationship and the conveyance of the artwork from GC2 to IGT NV. They can use the Seventh Amendment for that. They can use any other evidence for that. The actual bad acts are ancillary. They're a sideshow.

The Seventh Amendment itself is enough to establish what the parties' relationship was and how IGT NV became -- received or took possession of GC2's artwork.

THE COURT: What's wrong with what he just said?

MR. MEZA: Judge, it shows -- so the Seventh Amendment was entered into between GC2 and IGT as a result of other conduct that IGT engaged in which required the amendments and also led to the buyout in 2007, and it shows GC2's state of mind with regard to what happened in 2016 when they were told there was a gap of rights also, Judge.

THE COURT: The last part of that, say it again. It shows?

MR. MEZA: It shows GC2's state of mind with regard to what he -- what was going on in his mind when he was contacted March of 2016 by the defendant saying, guess what,

there's a gap in the rights.

THE COURT: Okay.

MR. MEZA: That's exactly what --

THE COURT: Okay. Gap in rights memo, or the email. Okay. Okay.

MR. LIEBMAN: Your Honor --

THE COURT: We are moving on to the next thing. I understand both sides' positions.

Defendants' -- next thing is defendants' breach of the Seventh Amendment to the contract. Defendant says not relevant because there's no breach of contract claim. Plaintiff says relevant because operating outside the scope of a license is an act of infringement.

So what's wrong with that?

MR. LIEBMAN: Your Honor, well, it's similar to the one we just argued, the eighth motion. They can use the Seventh Amendment for whatever purpose they want to without arguing that it was entered into because of a prior breach --

THE COURT: No, I'm on motion -- I'm sorry. I didn't preface this well enough. I'm on motion No. 9 now.

MR. LIEBMAN: Right. They can use the Seventh Amendment without arguing that we breached -- that IGT NV breached the Seventh Amendment. IGT NV does not contend, is not going to --

THE COURT: So what does that mean in practical

terms? How are they going to use the Seventh Amendment and nobody is going to say anything about how you were running afoul of it?

MR. LIEBMAN: Well, your Honor, we are not going to -- we don't claim -- defendants do not claim that they had a license to use this artwork. That's not going to be a defense in this case. So whether we breached the agreement or not, it doesn't matter. For the elements of their proving copyright infringement or the DMCA claim, whether we breached the agreement or not, whether we had an agreement in the first place or not, really doesn't matter.

Another important point, your Honor, is that we don't want -- we're concerned that at the close of their case, plaintiff will move to amend their pleadings to conform with the evidence that was established --

THE COURT: I want to make that a no-brainer. That's not going to happen. So solved that problem.

MR. LIEBMAN: So, your Honor, we think the breach is prejudicial, they argue that we breached the contract, and it's just unnecessary to prove the elements of their claim.

THE COURT: Okay. Respond to what he just said.

MS. CENAR: One of the things that has not been discussed that we do intend to do is the failure to affix the GC2 mark, which is a requirement under the agreement, and that relates --

THE COURT: Failure to -- you didn't say "fix," you said "affix."

MS. CENAR: Affix.

THE COURT: Okay. Got it.

MS. CENAR: -- (continuing) the GC2 mark and that that was a requirement of the parties, that that was part of the -- it's part of the alter and removing part of the DMCA, but also was a requirement for them. And so we would intend to address that --

THE COURT: How does that relate to the copyright or the DMCA claims?

MS. CENAR: Because that's the altering and removing --

THE COURT: I see.

MS. CENAR: -- elements.

THE COURT: So you're saying that if they were contractually obligated to affix the mark and they didn't, that amounts to an alteration?

MS. CENAR: The fact that they took the graphics, removed GC2's mark from it, removed IGT's mark from it, is an act of removal.

THE COURT: See, what you just -- yeah, okay --

MS. CENAR: And then -- and then replacing IGT's mark on it and replacing the copyright notice on it that's just IGT is an act of alteration.

THE COURT: All of that, I get. How does that relate to whether they breached the Seventh Amendment?

MS. CENAR: Because it's a -- it's their knowledge that they had a requirement to --

THE COURT: Is knowledge an element of one of these claims?

MS. CENAR: Yes. Under the DMCA, it is.

MR. LIEBMAN: Your Honor, the Seventh Amendment does not apply to online gaming. It only applies to land-based gaming. Whether we had a contractual obligation to place the mark on anything at all, particularly land-based games, has nothing to do with the DMCA claim.

And your Honor already ruled in summary judgment that there has to be preexisting CMI for there to be a removal CMI claim, and that provision of the contract just -- it's just not relevant to the DMCA claim at all.

THE COURT: Okay. I have ruled on 10 through 13. I've ruled on 15 through 17. So that leaves 14, and 14 is entitled Exclude Evidence of Revenue Figures Other Than the Most Recently Produced Amount.

So the response that the plaintiff filed in my view raises a legitimate problem in the sense that, well, you know, we've got to put all this in through deposition testimony. When the depositions were taken, we had a set of information. If we now have to use the current information, it completely

screws up the presentation of that testimony. And so that would seem to be a little problem, which perhaps you are going to tell me momentarily has been solved because the alternative that I proposed on plaintiff's motion in limine No. 2 is one that the defendant is agreeing to do, because that would solve this problem, I think.

The second issue has to do with expert reliance on figures, which maybe is different, but the experts are actually going to be here.

So what about what I've identified is a potential serious problem?

MR. LIEBMAN: Well, your Honor, with regard to the -- their presentation of the case -- you know, what this motion in limine really gets to, your Honor, what we're concerned about, is plaintiff arguing that IGT NV presented -- knowingly presented inaccurate or incomplete information at different points in time. That's what we really don't want to happen. If they have to use --

THE COURT: Stop.

Is that where this is going? Is that something you're intending to do, planning to do, proposing to do, thinking about doing?

MS. CENAR: No, but their expert is relying on exchanges with Frank Warzecha and Todd Nash in 2016, and in those discussions --

THE COURT: I already said something about that in the rulings that I made. So you --

MS. CENAR: Well, that's one of the points of clarification that we wanted to ask you about the rulings that you did issue.

But defendants' expert, Dana Trexler, is relying on that exchange --

THE COURT: Right.

MS. CENAR: -- and what Mr. Warzecha valued the claim at at that point in time as one of her bases for actual damage calculations.

THE COURT: Right.

MS. CENAR: It's our contention that the revenue numbers that they provided to him at that time were incomplete and inaccurate and that they --

THE COURT: And when I said -- when I said in -- hang on a second.

What I said in -- on page 2, ruling on motion in limine No. 10, when I granted the defendants' motion to exclude evidence relating to settlement disclosure -- discussions, when I said, quote, This does not preclude GC2 from challenging the completeness or accuracy of figures relied upon by a defense expert regarding damages, close quote, what you just said is exactly what I was referring to.

MS. CENAR: Right. But there were exchanges between

the parties on deliberate --

THE COURT: Let me kind of get to the nub of it here. Is the point that you just want to be able to show that the defendants' expert relied on information that has since been proved to be incomplete or the wrong information, or are you trying to also make the point that somebody was trying to pull the wool over somebody's eyes back in 2016?

MS. CENAR: Both, actually.

THE COURT: What's the relevance of the second point?

MS. CENAR: Because they're relying on what Mr. Warzecha valued his artwork at at the time based on --

THE COURT: Remind me who Warzecha is?

MR. LIEBMAN: GC2.

MS. CENAR: He is GC2.

THE COURT: Got it.

MR. LIEBMAN: Your Honor, that goes to the first part --

THE COURT: Stop. I am not done with her yet.

Yeah, I am having a hard time seeing what the probative value is of contentions that the info they gave him at that time was deliberately incorrect as opposed to just wrong.

MS. CENAR: Because there's email exchanges that --

THE COURT: So what? I mean, so what? What does that have to do with anything?

MS. CENAR: Because --

THE COURT: How does that help you -- let's talk about Rule 401, which says -- okay, which says, and I quote, Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.

So what's the fact that's of consequence in determining the action showing that they deliberately provided false information in 2016 would make more or less probable?

MS. CENAR: Because Mr. Warzecha was giving a valuation of resolution of this -- commercial resolution of this dispute.

THE COURT: But that goes back to settlement. You can't do that. That's an easy one.

MS. CENAR: Okay. If the settlement is out, then --

THE COURT: Like I said, can't do that. That's called a ruling.

All right. We are basically done with everything I want to talk about on the defense motions.

Oh, I'm sorry. There may have been one other little piece of that one. Excuse me. I just got to read through -- interpret something in my notes.

No.

Now I want to talk about what is left on the plaintiff's motions.

There's only one -- well, okay. There's two things on the plaintiff's motions, one of which I am going to make an oral ruling on, but I don't need to hear more commentary on, which I am going to do at the very end.

The second is this whole issue of where we are going on the question of when the witnesses are coming in. So have you had a chance to give that any -- I know it's been just since this morning.

MR. MACEY: If I bring somebody in, they don't have to put on their -- well, it's up to them. I don't think they should do both, but they don't have to read the deposition testimony.

I've told them who our shall witnesses already will be. If there is a may witness I take off the may list, I will tell them ahead of time.

THE COURT: So you basically have rejected the solution that I proposed, which was your alternative suggestion, which was --

MR. MACEY: What was my alternative?

THE COURT: -- you bring them in during the plaintiff's case and as -- you get to examine them to your heart's content without any restriction on the scope.

MR. MACEY: No, that's what I said I'm --

THE COURT: So you are going to bring them in during the plaintiff's case.

MR. MACEY: Yeah, yeah, but I have to tell them --
THE COURT: Okay. Fine.
MR. MACEY: But I have one request.
THE COURT: What's the request?
MR. MACEY: Well, my problem is is that I won't have any witnesses. I'll have no fact witnesses.
THE COURT: I can explain all of this to the jury.
MR. MACEY: That's all I care about.
THE COURT: I will absolutely -- you probably will need to remind me, but I am going to explain it all to the jury at the beginning --
MR. MACEY: That's all I care about.
THE COURT: -- that normally what would happen is the plaintiff would call witnesses, and then the defendant would call witnesses, there's some of the witnesses that would be put on by both sides, by deposition and otherwise. I have decided, and I directed the parties as a means of streamlining the trial, that those witnesses would be brought in during the plaintiff's case even though they're really defense witnesses and you should not hold that against the defendant in any way, shape, or form because it's a decision that I made.
MR. MACEY: Good.
THE COURT: Something like that will do it?
MR. MACEY: Fine. I just need advance warning. They're coming in from Seattle and Nevada --

THE COURT: Right. Okay.
MR. MACEY: -- I think, and Colorado.
No, no. Mr. Whistle will be here.
THE COURT: Okay.
MR. MEZA: And, Judge, if we could just have advance warning with a reasonable time --
THE COURT: I think he is going to want to know --
MR. MACEY: I've already told them all the shall-calls --
MR. MEZA: Right. I'm talking about the may-calls.
MR. MACEY: Yeah, there might be only one that I know of.
THE COURT: Okay. Fair enough. You'll work that out. I'm confident you'll work that out.
Okay. I want to flip ahead to the expert stuff, which I am not going to be able to rule on today, but I really want to get more of a -- how shall I put it? -- big picture sense.
Okay. So the -- I actually want to start with the defense. The defense has got, if I'm understanding this correctly, two expert witnesses, Trexler and Hawkins; is that right?
MR. MACEY: That's correct, your Honor.
THE COURT: Okay. So I know what Hawkins' testimony is because there is a motion in limine on him, and so I've

read his report a couple of times.

What exactly is Trexler going to talk about?

MR. MACEY: Trexler is going to say, based on reviewing -- this is real general.

THE COURT: Yeah. That's what I am looking for.

MR. MACEY: Based on reviewing other license agreements -- well, we all know what the revenue is. That's really not a fight in this case. She's going to say, these are what the costs are, based on the information she has, which gets you down to profits.

And then she's going to say based on reviewing license agreements, based on reviewing -- what do they call them? -- works-for-hire agreements --

THE COURT: Yeah, works-for-hire agreements.

MR. MACEY: -- okay, et cetera, those kinds of things, she will opine what percentage she maintains art would have --

THE COURT: She is going to apportion the profits, basically.

MR. MACEY: Exactly, exactly.

THE COURT: Profits apportionment.

MR. MACEY: Also --

THE COURT: Is she also going to talk about reasonable royalty?

MR. MACEY: Yes, she does that too.

THE COURT: Okay. Because that's damages, not profits, right?

MR. MACEY: That is correct. She will do a reasonable royalty on a --

THE COURT: But she's talking about both damages and the profits side of the relief aspect.

MR. MACEY: Exactly.

THE COURT: On damages, she's talking largely about reasonable royalty. On revenue, she's basically saying, here is the cost and here is how you apportion the profits.

MR. MACEY: Thank you.

THE COURT: Okay. So now -- now we get to Hawkins.

MR. MACEY: Yes.

THE COURT: And I kind of read Hawkins as doing the same -- I mean as talking about the same topics.

MR. MACEY: Different way.

THE COURT: In a different way.

MR. MACEY: Same topics. Not -- yeah, in a different way.

THE COURT: Okay. And since -- and part of this is I don't have the benefit of Trexler's report. I mean, I am not saying it's not buried in some summary judgment material somewhere. I am talking about what I got right now.

So can you kind of give me in a big picture sense the difference in -- when you say "in a different way," what do

you mean?

MR. MACEY: I'm a game developer. I've been developing games since EA -- since I started EA Sports back in the '80s, I think. Okay? This is what I do for a living. I'm a business person. Okay? This is what I do for a living, developing these games all the time. I have to pay artists, I have to pay engineers, I have to pay for all the costs related to developing a game. Okay?

I put an economic value on art as a businessperson as it relates to the game development and the revenue and profits that are attributable to it. I believe, in my opinion and based on my experience, with specific statements of experience, okay, that this art is relatively replaceable, okay, and, therefore, I would not pay a lot more money for it, et cetera, et cetera.

THE COURT: Okay.

MR. MACEY: That's essentially his opinion. Hawkins -- Trexler really doesn't do that.

THE COURT: What's Trexler's background?

MR. MACEY: Well, Trexler is a CPA --

THE COURT: Okay. So it's from a -- it's from a financial standpoint --

MR. MACEY: Absolutely.

THE COURT: -- as opposed to --

MR. MACEY: Hawkins is a business perspective.

Different method, different.

THE COURT: Okay. All right. Now, plaintiff's experts. Give me just a second here.

MR. MACEY: I'll let them --

THE COURT: So as I understand it, we've got -- not necessarily in this order, we've got Laykin -- I am talking about all the experts. We have Laykin, we have Holt, we've got John, and we've got there's one other one.

MS. CENAR: Gaud.

THE COURT: Right. Gaud, G-a-u-d. Okay.

Laykin is not talking about anything relating to damages or profits, right?

MR. MEZA: He is the technical --

THE COURT: He is talking about this is how this whole stuff works and this is when distribution happens and all this kind of stuff.

MR. MEZA: Correct.

THE COURT: That's not related to any -- Holt, whose stuff I've read, she's on your will-call list, and she's going to talk about both royalty, reasonable -- she is going to talk about both royalty, reasonable -- she's going to talk about both damages and profits; am I right?

MS. CENAR: Yes.

MR. MEZA: Correct.

THE COURT: Now, you guys have referred to the other

two -- and I recognize, by the way, so just to be clear and just so I make sure you understand that I know what the standard is -- on damages, the plaintiff has the burden of proof. On profits, the plaintiff just has to show the revenues, and the burden shifts to the defendant to prove costs and apportionment.

So Laykin is actually partly an affirmative witness and partly a rebuttal witness because she is rebutting the profits stuff, right?

MS. CENAR: You mean Holt.

MR. MEZA: Holt.

THE COURT: Holt.

MR. MEZA: That's correct.

THE COURT: Now, explain to me where -- and I've read the reports, but I want you to explain to me where kind of in the big picture John and Gaud fit in. What exactly are they rebutting, because you have called them rebuttal experts.

MR. MEZA: So Mr. Hawkins is going to say to the jury the artwork, the GC2 artwork graphics, represented less than 1 percent --

THE COURT: Minimal value.

MR. MEZA: 1 percent.

THE COURT: Right.

MR. MEZA: And they're going to rebut that. They're going to say the value actually is about 50 percent because --

THE COURT: Okay. So here's my question. So partly -- so does Holt's testimony rebut what you just described from Hawkins' testimony at all?

MS. CENAR: Holt's testimony addresses the position of both Trexler and Hawkins that this is low cost and the graphics can be easily swapped out.

THE COURT: Okay.

MS. CENAR: Gaud testifies that art and graphics are not low cost and they cannot be easily swapped out without impact on revenues from the same --

THE COURT: Where does John fit in?

MS. CENAR: And John addresses the Hawkins low cost, that these are --

MR. MEZA: Works for hire.

MS. CENAR: -- fungible works for hire.

THE COURT: Okay. So is there -- are John and -- I mean, how -- what's -- I asked Mr. Macey what's the difference between Trexler and Hawkins. I'm asking you what's the difference between John and Gaud.

MS. CENAR: I think they address different parts of Hawkins' report, and Gaud addresses a part of Hawkins' report and Trexler's opinion that she has a copyright design-around theory, right, where you can just swap out the graphics for non-infringing, and he addresses how that has impact -- that's risky and has impact on revenues.

Whereas, Hawkins says it can be swapped out with no risk, and Trexler adopts that from an economic perspective.

So Gaud actually touches the economic perspective of Trexler and the business perspective of Hawkins.

THE COURT: Okay. So I want to talk about -- I want to talk about Hawkins a second here, but it's really not just about -- I want to ask some questions about Hawkins, but it's really not just about Hawkins. It's about a lot of this stuff. And, again, I have not read or seen, at least not recently, Trexler's report, which I put in a different category.

So I read Hawkins' report. He's got this very, you know, long and illustrious background in developing digital games -- we used to call video games -- digital games. I understand I believe his testimony that relates to reasonable royalty. And what I mean by that is when he says you can't possibly pay more than a relatively small percentage for artwork because you got to spend all this money on marketing and you got to spend all this money on distribution and Amazon is taking a slice and everybody is taking a slice and you can't just economically -- it just doesn't work, you can't spend a lot of money on this, and by the way, there's a million and one people who do this stuff, and not that they're all fungible, but they're kind of like a dime a dozen, that's an overstatement of what he says, that I see as relating

largely to reasonable royalty. We would not pay -- a reasonable person would not pay people who did this artwork more than X.

It maybe has some sort of tenuous logical relationship to profits, but I see the profits testimony as different.

And so when you get over to the profits aspect of it, it becomes -- it becomes to me -- and I have to say I think I kind of say the same thing about some of what I have seen on the plaintiff's side, and I can't quote you chapter and verse on exactly who the witness or witnesses are -- but it's basically -- it becomes a lot more -- touchy-feely is the wrong word, but that's kind of what the sense I get.

In other words, this guy hasn't done a study to say, okay, I've analyzed the various factors that go into determining what -- determining the profitability of the game, and I kind of pull them out in these various ways and in these various proportions. And I wouldn't say that somebody has to have done a study, but they have to have some kind of a methodology that we can kind of figure out what it is, and it can be critiqued, potentially replicated or at least, you know, attempt to replicate it, and I am having a hard time finding that in here. It all seems like it's like, I'm the guy who knows everything about this business, and here's the answer, less than 1 percent.

So can you help me out on this a little bit?

MR. MACEY: Sure. I agree with you except for one point.

THE COURT: What's the one point?

MR. MACEY: Okay. He testifies what it usually costs to buy this type of artwork. For example, he compares a slot game -- do you know Fortnite? Do you know -- okay. A game where there is an avatar, where you control somebody, and they're moving around, and you're playing with multiple people all over the --

THE COURT: It's an interactive game.

MR. MACEY: Exactly.

Okay. This is a slot game, okay?

THE COURT: It's not interactive at all.

MR. MACEY: And he compares the cost with respect to that and says, these costs are de minimis for this kind of a thing.

If you look at the decision that actually both sides site, and it's the Ty, Inc., decision, we both cite it, okay? And what the judge said there --

THE COURT: That's the one where the judge says nobody is an expert in this?

MR. MACEY: Yeah, but he went on and said what it usually costs to buy the copyright-protected material is relevant to a person, and he permitted testimony for that.

And that's what Mr. -- that's that portion of what Mr. Hawkins' testimony will be.

With respect -- everybody else is gestalt. I agree with you.

THE COURT: Yeah, okay. I mean, I don't know exactly everything that was in front of the judge in Ty -- I'm forgetting who that was --

MR. MACEY: Who is the former State Police commissioner?

MS. PARKER: Judge Zagel.

MR. MACEY: Judge Zagel.

THE COURT: Judge Zagel. I don't --

MR. MACEY: Thank you.

THE COURT: I don't know exactly everything that was before him at the time, and I guess it would be hard to -- it would be hard to dispute the proposition that what it costs is relevant, but I don't think that's what we are talking about when we are talking about these witnesses' testimony.

I mean, it's one thing to say, hey, this stuff is cheap, never pay more than 20 grand for it, never pay more than 30 grand, I have done a survey, nobody pays more than 20 grand for this. That's one thing.

But then to translate that into what's its contribution into profitability, I mean, is another thing.

So, for example, I mean, you know, I used -- I used

the -- and I have not seen the movie -- Roma, okay? So the lead actor in that movie is somebody who never acted before, never been in a movie before, probably had to pay her 30 grand, okay? And maybe she ends up winning an Academy Award, and maybe what people read and see about her ends up being this massive contribution to the profitability of the movie, and it's not just that this very famous director made it.

The fact that you only put X into something doesn't mean that -- the costs aren't necessary -- aren't -- I guess my point is that the cost of something is not necessarily proportional to its contribution to the profitability. That seems to me to be a question of economics that really isn't addressed by at least what I've seen here.

In other words -- and that's -- it's clear that that's the connection that Mr. Hawkins is trying to draw and that you are drawing is that, okay, we wouldn't pay more than this for it, how could it possibly contribute much to profitability --

MR. MACEY: An investor -- it's an investor decision. It's like any -- it's like you bring in a venture capital guy who says, I want you to put up this kind of money. He says, well, I'm not going to pay this much for artwork because it doesn't -- it's not going to -- I'm -- because I care about the profitability, and this has nothing to do with the profitability, as far as I'm concerned --

THE COURT: Yeah. The part that --

MR. MACEY: -- so I'm not going to pay a lot for it --

THE COURT: The part --

MR. MACEY: -- any more than I would have paid -- I'm sorry.

THE COURT: The part that I am having a hard time getting is how he knows that. In other words, how he knows or what's his basis for saying that it doesn't contribute to the profits.

MR. MACEY: Because, see, he has invested and created and done this for the past 40 years. That's what he does for a living. Okay? That's exactly what he does for a living.

And the other thing he testifies to is that because DDI --

THE COURT: I guess my -- I guess my problem -- or part -- it's not my whole problem. Part of my problem is, okay, I get that, the guy is in the business. But I think that what Daubert contemplates is that this isn't just gut. And there may be situations in which gut's good enough, but that's kind of what I am getting out of -- I like to say it's not necessarily just him. It's a lot of this testimony. My big kind of overarching view was I either let it all in or I don't let any of it in, okay? But a lot of it seems to me to be gut, and I'm not sure that I'm persuaded at this point that

determining something -- some factor's contribution to profitability is something that's appropriately based on educated -- highly educated gut. That's the part I am having trouble with.

So it would be helpful -- and this is an issue with some of the people on the plaintiff's side too. So if anybody wants to try to help me out on that.

MR. MACEY: Well, the other point I believe that Mr. Hawkins makes repeatedly is the fact that what DoubleDown did is when they started this business, they used Facebook as the platform. And because Facebook was such a huge new media for a social media, it generated huge revenues, and, therefore, the profitability was a function, not simply of the artwork, but of the platform that it was put on to be able to generate the revenues. And that's based on someone who has had this experience in the business of developing games and putting them on various platforms.

THE COURT: How does he figure out that this is 1 percent?

MR. MACEY: How does he get to that number?

THE COURT: It's a number.

MR. MACEY: I agree with that. That is based on experience and what he'd be willing to pay for artwork under these circumstances for these casino games online.

THE COURT: So who is your countervailing person or

people with regard to this aspect of Hawkins' testimony?

MS. CENAR: Gaud is our main one, your Honor, and he does it in two ways. He does it with respect to approaching the cost piece of it, that Hawkins is off base as to the cost of artwork, and that artwork is fungible and the less than 1 percent. And he also addresses it from the you just can't swap out graphics for cheap alternatives or go to a -- you know, a Chinese company to do just okay graphics for these when you're using known artwork and graphics.

THE COURT: Okay. Let me ask my question in a different way.

So if I were to say that the profits aspect of Hawkins' testimony is he is describing all of the factors that contribute to profitability of a game like this, full stop, I am not saying that this is 10 percent and this is 5 percent and this is 3 percent and this is 20 percent, who is the person -- is there a person on the plaintiff's side that's going to come in and say, he's wrong about that and let's take it to the next step?

Is there somebody who is going to come and say when Hawkins -- if I let Hawkins testify, when Hawkins says that I know from my experience that the fact that they were distributing this thing on Facebook was a very significant driver of profitability, is there somebody who is going to say, he's evaluating that wrong, or, he's overweighing that,

or is there somebody who is doing that?

MS. CENAR: No. There are fact witnesses that say the opposite of what Hawkins says.

THE COURT: Not an expert, though.

MS. CENAR: Right.

THE COURT: Okay. All right. I am going to regret doing this, but each side can have five minutes to tell me anything that you want -- a lot of ink has been spilled about the experts, and I don't really need more -- it's not about law, really. It's about applying law to the facts.

I will give each side five minutes to say anything more that you want to say about any of the experts, and you don't have to use the whole five minutes or any of it. But if you want to, that's fine. But it's no more than five.

MS. PARKER: About the experts or anything?

THE COURT: Just about the experts.

MR. MEZA: With regard to --

THE COURT: Either your own experts or the other side's experts.

MR. MEZA: Judge, with regard to the experts, Ms. Trexler, the defendants' expert, used information that you've now ruled is inadmissible.

THE COURT: Which is what?

MR. MEZA: Which is that 2.8 million, the settlement discussions --

MS. CENAR: The 2016 discussion.

MR. MEZA: -- the 2016 discussions, to --

THE COURT: I don't think I said it was inadmissible. I said that the fact of settlement discussions was not admissible. I didn't say that any data that was exchanged during the settlement discussions wasn't admissible.

She can use the data, and then you can attempt to show that the data was -- that she relied on incorrect data. And I still have an open -- there's still an open question about whether you can put in or whether it was deliberately incorrect. That's something I still have to rule on. That's what I think I have done.

MR. MEZA: All right. And the other one, Judge, and we didn't touch on this, is on page 3 of your ruling.

THE COURT: Yes.

MR. MEZA: Revenues generated by casino operators.

THE COURT: Okay.

MR. MEZA: So we understand the decision with regard to the Deltek decision and the value of use and the casino partners, but there was some revenue that IGT did receive as a result of them giving that artwork to the casino partners. So that -- those moneys are in the revenue pile, and we just want to --

THE COURT: If it's revenue that IGT got, it's revenue that IGT got. We don't have to worry about whether it

came from A, B -- or we don't have to worry about whether the casino operators got more or less or whatever, right?

MS. CENAR: It's calculated off of that.

THE COURT: So what? Isn't the relevant number the figure that IGT got, based on the ruling I made, at least?

MS. CENAR: Based on your ruling.

MR. MEZA: Yes.

THE COURT: Okay. Then that seems to me to be the answer.

Okay. Do you guys want to say anything more about experts at all?

MR. MACEY: Only one thing to help the Court pay particular attention to Mr. Laykin's declaration, which he --

THE COURT: Oh, no, I know there is an issue about a 26(a)(2) disclosure.

MR. MACEY: Absolutely. Okay. Thank you.

THE COURT: I get that.

MR. MACEY: That's it.

THE COURT: Actually -- give me a second. Let me just look at this again and see whether there was something -- I'm actually glad you brought that up, because I want to see whether there was something I wanted to ask about that.

No, I wanted to make sure it was dealt with in the response. That's fine. I will deal with all that when I deal with it.

MR. MACEY: Thank you.

THE COURT: Okay. So let's talk -- before I get to the last thing I have to do, let's talk a little bit -- so we've got a date, I mean, I recognize that some of the rulings I haven't made yet are going to impact it, but when I got to the part of the pretrial -- and I know we've talked about this before. When I got to the part of the pretrial order that talked about length of trial, when somebody says "no more than X," I break out into a cold sweat because that could mean it could be X. And I guess I never really saw this as a two-week trial.

So do people think it's really a two-week trial? When you say "no more than two weeks," that could mean a day and a half or it could mean 10 days, okay?

MR. HORMUTH: It may not take the full two weeks now, and we have some clarity on how we're going to handle live witnesses and not be cumulative of --

THE COURT: So that may -- that may resolve some of those issues.

MR. HORMUTH: -- so that helps a little bit. But I think it's going to be --

THE COURT: So what I am going to do, though, my goal is going to be to try to rule on all of the remaining motions in limine within the next week or maybe a week from tomorrow, and then I'm probably going to bring you back in just for a

quick status in chambers maybe the week right before Christmas and say, okay, now I've ruled on this stuff. I really need to know how many days we are talking about here so I can just plan around it.

So just figure that there's going to be some sort of a status like that. We may even be able to do it by phone, frankly, because I know we have some out-of-town people here.

Okay. So now I have one other thing to rule on. Is there anything anybody wants to -- any issues anybody wants to bring up with me, clarification stuff, anything that you want to --

MR. MACEY: Well, the last time we were before you in the jury room in the back talking at a status, you were going to set a date today of when the parties had to make objections to exhibits --

THE COURT: Ah, okay.

MR. MACEY: -- and to deposition designations.

THE COURT: Dep designations.

Yeah, but that's probably still even a little premature, though, right?

MR. MACEY: I agree, because of the motions in limine.

THE COURT: Yeah. Okay. Then I'll -- what I'll do is -- if I don't do that -- if I don't remember to do that when I issue the ruling on the remaining motions in limine,

just remind me; or somebody will remind me in the status, and we will talk about dates for that.

Okay. So the last issue is this -- is plaintiff's motion in limine No. 4. And let me just pull up the motion here.

It's entitled Preclude IGT from Soliciting Testimony or Evidence Inconsistent with the, quote, unquote, Uncoached Corporate Testimony That It Does Not Claim Copyright Ownership Over the Artworks and Graphics in Coyote Moon and Pharaoh's Fortune and Preclude IGT NV from Offering Contrary Testimony Or Evidence. Kind of a long title.

It all concerns the deposition of an individual by the name of Steve Kastner, K-a-s-t-n-e-r, and some testimony that was given by him. It starts on page 47 of his deposition and goes over to page, basically, 52 or top of 53.

And I'm making an oral ruling on this for reasons that I think will become obvious, but if they are not obvious, I'll explain it at the end.

So basically what happens, so Kastner is being deposed. He's one of the corporate witnesses designated by one or more of the defendants. And at the bottom of page 47 of his deposition, he's asked the following question: Does IGT NV contend that they own the copyright rights to the artwork and graphics that's Exhibits 154 to 158? And these are exhibits that had been shown. He answers -- there's no

objection, answers directly, without equivocation: 154 to 156, no, and as discussed previously, 157 and 158, there's some contention.

"QUESTION: Why do you say no for 154 to 156?

"ANSWER: We don't contend that we own the art.

"QUESTION: Okay. Who owns the artwork and graphics for 154?

"ANSWER: BC2.

"QUESTION: GC2?

"ANSWER: GC2. Sorry."

And then the material that is the bone of contention in this motion happens. The attorney who was there for the defendant says -- they object to the form of the question, calls for a legal conclusion.

The lawyer for the plaintiff says, Who owns the artwork and graphics for Exhibit 155? Lawyer for the defendant says, Calls for a legal conclusion. The witness says, As stated, I believe our legal counsel would be the better ones to answer that.

It goes, I would say, further off the rails after that.

At the top of page -- I'm really over on -- towards the bottom of page 48. The lawyer asks -- after some more colloquy, the lawyer says, You pointed to Exhibits 154, 155, and 156 as IGT NV not owning the artwork and graphics,

question mark.

I interject here myself, which is precisely what the guy said at the top of the page. The lawyer for the defendant says, That question called for a legal conclusion. I missed the objection, but stating it now, that question calls for a legal conclusion. The witness is here to testify about the facts.

The witness, I say advisedly picking up on the cue, says, I don't know.

There's some further discussion, colloquy back and forth, questions about -- and similar objections. And then at some point, the lawyer -- within the next page, the lawyer for the defendant says, Let's take a break.

The lawyer for the plaintiff finishes asking the question. Defendants' lawyer says, Objection, calls for a legal conclusion. Let's take a break. The plaintiff's lawyer insists on an answer. The defense lawyer says, I asked for a break before you asked the question.

There's some sniping back and forth. A break is taken for about 10 minutes. The pending question is read back. And Mr. Kastner then does what I call, advisedly, a 180 and says, We actually -- for all five exhibits, we own the relevant marks.

"QUESTION: You own the relevant marks?

"ANSWER: I'm sorry. The copyright.

"QUESTION: Okay. Who is 'we'?

"ANSWER: IGT.

"QUESTION: Did you discuss this question with your counsel while you were out in the hallway?"

Almost a rhetorical question because the answer is obvious.

And then there is a series of privilege objections.

So the motion that's made is to basically bind the defendant to the answer that Mr. Kastner gave unequivocally under oath without objection before all of this nonsense happened. And I am not writing this in an opinion out of deference to the lawyer who did all of this.

The objections were improper, they were legally frivolous, and they had no good-faith basis. These were not questions that called for legal conclusions. They were calling for factual testimony and the company's position.

The objections, I am finding, were interposed for an improper purpose; specifically, to signal to the witness to modify his testimony and to change his answers. There is absolutely not a single bit of doubt or hesitation in my mind that that was the exact purpose for which this was done. It was completely improper conduct by an attorney that went beyond the bounds of appropriate advocacy. And it worked. The witness first started to hedge, then backed off, and then reversed his testimony entirely.

It is not appropriate to allow the defendants to benefit from this completely improper conduct by their lawyer.

So the first part of it is easy and was agreed to by the defendant. None of the postbreak testimony can be used by the defendant. That was agreed to.

None of it can be referenced by the defendant or the witnesses if he testifies live, that part wasn't agreed to, unless the plaintiff decides to elicit it.

The plaintiff can introduce page 47, line 23, to page 48, line 9, and stop right there. And if the plaintiff does that, the defendant may not introduce the other testimony, nor may the witness reference it if he testifies live.

Now, I can imagine from a strategic standpoint the plaintiff saying -- and I think -- I mean, if it were me, I'd almost do it this way, but it's not my call -- the plaintiff saying, I just want to put the whole thing in in front of the jury and let them see it in all of its glory, including the request for a break and going out in the hall and he comes back and do -- does a 180. And you just lay it in front of the jury and say, there it is, ladies and gentlemen, right there. But that's a -- or maybe everything right up to the break.

That's a strategic question. The plaintiff can do that if it wants to. If it stops -- if you decide to present

it up to the break and not past the break, the defendant cannot put in any of the postbreak testimony or elicit it from this witness.

And if -- and then the last piece of this is that given my view, which I've expressed on one of the other motions in limine, I think it was No. 3 by the plaintiff on the binding -- on the nature of the binding effect or not binding effect of 30(b)(6) testimony -- in other words, that it doesn't bar a party from trying to contradict it -- I'm not going to bar the defendant from trying to contradict it during the trial, but if the defendant attempts to do so, there will be an instruction to the jury regarding the effect of Rule 30(b)(6) testimony as I've discussed elsewhere.

Okay. So motion in limine No. 4 by the plaintiff is granted to that extent. And all I am going to say is that the opinion was written, okay, and I am not issuing it that way, and I haven't named anybody.

So there you go.

I'll issue a written ruling on everything else, like I say, within the next week or eight days, and I'll get you back in here for a status or on the phone a week after that, the week after that. Okay?

Take care.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Carolyn R. Cox Date
Official Court Reporter
Northern District of Illinois

/s/Carolyn R. Cox, CSR, RPR, CRR, FCRR